



# BOARD OF INQUIRY (*Human Rights Code*)

IN THE MATTER OF the Ontario *Human Rights Code*, R.S.O. 1990, c.H.19, as amended;

AND IN THE MATTER OF the complaint by John McCallum dated January 6, 1994 alleging discrimination in employment on the basis of sexual orientation.

**B E T W E E N :**

Ontario Human Rights Commission

- and -

John McCallum

Complainant

- and -

Toronto Transit Commission

Respondent

- and -

The Attorney General of Ontario

Intervenor

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## INTERIM DECISION

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Adjudicator : Gerry K. McNeilly

Date : March 29, 1996

Board File No: BI-0040-95

Decision No : 96-008-I

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## A P P E A R A N C E S

Ontario Human Rights Commission

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Fiona Sampson  
Counsel

John McCallum

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John McCallum  
On his own behalf

Toronto Transit Commission

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David Wakely  
Counsel

The Attorney General of Ontario

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Peter Landmann  
Counsel



## THE MOTION

This motion was brought by the Intervenor, the Attorney General of Ontario (AG) for:

1. an order adjourning the proceeding until the decision in *Dwyer and Sims v. The Municipality of Metropolitan Toronto and The Attorney General of Ontario*, currently before the Board of Inquiry, has been rendered.
2. an order vacating the dates in March and April 1996 which were set for hearing of this matter and retaining the alternative dates of September and October 1996.

The Respondent in this matter, the Toronto Transit Commission (TTC) supports the request for adjournment brought by the AG.

The Ontario Human Rights Commission (OHRC) and the Complainant Mr. McCallum (the Complainant) both oppose the request for adjournment and ask that the hearing proceed as scheduled in March and April 1996.

There were some eight exhibits filed on this motion. Evidence was called by all parties.

## ISSUES

Should this matter be adjourned to the September 1996 dates to await the decision in the *Sims/Dwyer* matter? To answer this question, the prejudice occasioned by the proposed adjournment must be considered.

The AG's position is essentially as follows:

- i. the AG contends that given that the complaint in this matter raises virtually identical issue to the issues in another ongoing hearing before the Board of Inquiry, this matter should be adjourned to the September 1996 dates;
- ii. the AG is not in a position to adduce the same evidence again in a parallel proceeding; and
- iii. the Complainant will not be prejudiced in any way which cannot be compensated for by damages, if the complaint is upheld on its merits.

The TTC supports the motion and takes the following position:

- i. the TTC contends that they should not be required to expend time and money in these proceedings while there is a similar proceeding underway; and
- ii. that while the decision in the other ongoing proceeding will not be binding upon the TTC, it is not taking an aggressive position of the issue raised by the complaint.

The Respondents to the motion, the OHRC and the Complainant, take the following position:

- i. the Complainant will be prejudiced by the delay in commencing this hearing;
- ii. he has a right to have his matter heard expeditiously;
- iii. this instant complaint is different from the *Sims/Dwyer* matter as it involves different legislation;
- iv. the result in the *Sims/Dwyer* may not extend to this matter and may not resolve this complaint;
- v. this complaint will eventually have to be litigated; and
- vi. a decision in the *Sims/Dwyer* matter will not be binding on this Board.

## DISCUSSION

The Complainant in this matter alleges discrimination with respect to employment on the basis of sexual orientation by the TTC. Specifically, the complaint relates to the definition of "spouse" in section 107 of the *Municipality of Metropolitan Toronto Act (MMTA)* and the policy of the TTC to deny the extension of spousal benefits to same sex spouses, allegedly in violation of the *Human Rights Code*.

In the *Sims/Dwyer* matter, the complaint relates to the definition of spouse in section 1 of the *Municipal Act*, an act that does not apply to the TTC. The Respondent TTC is a public transit system that is an agency of the Municipality of Metropolitan Toronto. The corresponding legislation, the *MMTA* governs the Respondent TTC.

The AG's position, supported by the Respondent TTC, is that this proceeding should be adjourned to September 1996 to await the decision in the *Sims/Dwyer* matter given that these two complaints raise *Human Rights Code* and *Charter* issues relating to the same-sex benefits which are of considerable public importance and are virtually identical. The AG contends that it has placed before the *Sims/Dwyer* Board a full factual record including the expert evidence of a benefits consultant at considerable public expense and is not in a position to adduce the same evidence again. Furthermore, it would be consistent with the proper and efficient administration of justice to adjourn this matter as requested.

The AG and the TTC argued that to commence the hearing on the merits of this matter in April 1996 before the decision of the *Sims/Dwyer* is released will be unduly expensive, duplicative, time consuming and would force the AG Ontario to remove itself from active participation due to prohibitive cost. The TTC has undertaken to guarantee to the Complainant McCallum's partner, who is also employed by the TTC, medical benefits until the September 1996 dates scheduled, provided that he remains an employee of the TTC and is not terminated for cause or does not quit. The TTC has also stated that while the decision in the *Sims/Dwyer* matter will not strictly bind the TTC, because it is an agency of the Municipality of Metropolitan Toronto any decision against Metropolitan Toronto may provide guidance to the TTC or may ultimately be viewed as binding upon the TTC.

The Complainant and the OHRC's evidence is that the complaint in the *Sims/Dwyer* matter involves different Complainants, different Respondents, different pieces of legislation and a different definition of "spouse." They assert that there is no multiplicity of proceedings where there are different parties and different issues. They also note that while s.17 of the *MMTA* referentially incorporates parts of the *Municipal Act*, it does not incorporate the definition of spouse found in section 1 of the *Municipal Act*, which is the subject matter of the *Sims/Dwyer* complaint. They also assert that the request to adjourn will be prejudicial to the Complainant and that there are no guarantees of when the Board in the *Sims/Dwyer* matter will release its decision. Further, the Board's decision in the *Sims/Dwyer* matter is not strictly binding upon this Board and there will not likely be any costs savings as the McCallum matter will eventually have to be litigated.

The Complainant also contends that the decision in the *Sims/Dwyer* matter may be appealed and this would cause further possible delays in his matter being heard. Also, if the AG is concerned about cost savings the parties may consent to transcripts of part or all of the expert evidence from the *Sims/Dwyer* hearing being used in this matter.



The Complainant asserts that he is entitled to have his complaint heard as expeditiously as possible, more so, given the medical condition (diabetes) of his partner.

## DECISION

In my view, while I agree with the position of the AG Ontario that the *Sims/Dwyer* case is the first case since the Supreme Court of Canada in *Egan v. Canada* ([1995] 2 S.C.R. 513) to deal with same-sex benefits, I disagree that the issues raised are identical. While there is the similar issue of same-sex benefits raised and while it can be said that Metropolitan Toronto is involved in both matters, its involvement in the *Sims/Dwyer* matter is direct as the two complainants are employees of Metropolitan Toronto, while its involvement in this instant case is indirect as the Complainant is an employee of TTC. Additionally, there are two very specific and distinct pieces of legislation involved with two different definitions of spouse. And lastly, in the *Sims/Dwyer* matter, the Dwyer complaint also involves pension benefits; an issue not addressed in the instant matter.

While I agree that the two complaints are not identical, there are some similarities. They both deal with same-sex benefits and they both deal with provincial acts governing municipal bodies. I do agree with the Complainant and the OHRC that the McCallum matter is less complex than the *Sims/Dwyer* matter and will take less time to litigate. Section 138 of the *Courts of Justice Act*, R.S.O. 1990, c.43 states that multiplicity of legal proceedings shall be avoided. While these two proceedings do not neatly fall under this definition, they are similar in nature and will result in some duplication in proceeding given the role of the intervenor, the AG and the financial impact of both cases on the Respondent, Metropolitan Toronto.

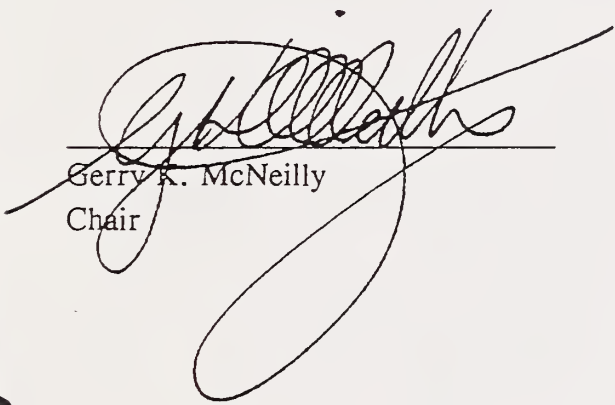
While I agree that Mr. McCallum is entitled to an expeditious hearing of his complaint, the additional cost that will be incurred to litigate his complaint, given the similarities with the *Sims/Dwyer* matter, justifies, in my view, the granting of the motion to adjourn. The issues raised in both these complaints raises issues of great public concern and should be fully litigated before a determination is made.

It is my view that it would be prudent to adjourn the instant complaint to the scheduled September 1996 dates. I anticipate that there will be no prejudice to the Complainant given the undertaking by the TTC to provide benefits to his partner up to the September dates pending the decision in the *Sims/Dwyer* matter. Further, it is quite conceivable that the outcome in the *Sims/Dwyer* complaints may provide guidance in this instant complaint. The parties may be able to adopt the decision or alternatively use it to shorten the instant hearing.



The motion brought by AG to adjourn this matter to the scheduled September 1996 dates is granted. This matter will commence as scheduled for hearing September 24, 1996 at 9:30 a.m., and I expect that the parties will turn their minds to the effect of a decision, if any, in the *Sims/Dwyer* matter on the continuation of this instant proceeding. I so order.

Dated this 29th day of March, 1996.



Gerry K. McNeilly  
Chair

